In the Supreme Court of the United States.

OCTOBER TERM, 1921.

CHARLES F. WOOD AND JOHN L. MOYER, trading as the Philadelphia Steam Heating Company, appellants,
v.
THE UNITED STATES.
No. 100.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On November 21, 1899, claimants filed their petition in the Court of Claims for $63,099.10, damages alleged to have been sustained by claimants through certain delays in the performance of their contract with the United States for furnishing and installing a heating and ventilating plant in the post-office building at Washington, D. C. It was alleged the United States was responsible for the suspensions and delays in the completion of the contract, and should answer for the damage sustained.

On January 25, 1897, the United States, through the Office of the Supervising Architect of the Treasury Department, advertised for sealed proposals for the furnishing of all material and labor for, and the installation of, a boiler plant, low-pressure steam heating and ventilating apparatus, etc., for the United States post-office building at Washington, D. C., in accordance with plans and specifications referred to in said advertisement. (R. 79.)

The Philadelphia Steam Heating Company of Philadelphia, Pa., a partnership, consisting of Charles F. Wood, John L. Moyer, and another, on February 26, 1897, submitted a proposal to supply the material and perform the labor for the sum of $114,773, which proposal, with certain modifications and a consequent reduction of the price to $111,373, was accepted, and a contract therefor executed on March 29, 1897, and approved April 5, 1897. (R. 79.)

The time allowed by the contract for the completion of the entire work was 250 working days after the approval of the contract and bond, which period expired on January 28, 1898. (R. 79.) The work was substantially completed about August 1, 1899, approximately eighteen months after the expiration of the contract period, and was accepted on behalf of the United States in September, 1899. (R. 79.)

The contractor began work on the contract in Washington on or about April 18, 1897, and by May 1, 1897, had about forty workmen employed thereon. (R. 80.)

On May 8, 1897, the contractor received written notice from the Secretary of the Treasury to "defer all work incident to galvanized-iron vent duct work and running steam risers for interior rooms, including and above second story." The contractor was also advised that "an allowance will be made to you of one day additional for each day's delay caused by the Government, as provided for by your contract." (R. 80.)

On May 13, 1897, the contractor wrote the Supervising Architect as follows:

> We beg to advise you that on May 11 we received verbal instructions from Mr. John W. Kinsey, superintendent of construction at the U. S. post office, Washington, D. C., to cease work on the galvanized-iron work in said building in the basement until such time as the plasterer shall have finished his work. These orders, together with those contained in the department letter of May 8, stop this branch of our work entirely. We are not objecting to this, but we desire to call the department's attention to the matter in order that we may be entitled to extra time should we be unable to complete the work within the time named in our contract.

Following the suspension of that part of the work referred to, certain changes in the plans were made and the revised plans furnished the contractor with a request for a proposal covering said changes. The contractor on January 6, 1898, submitted proposal covering the changes and on January 19, 1898, sub-

mitted itemized statement of the increased cost. On March 3, 1898, the Assistant Secretary of the Treasury advised the contractor that the proposal was accepted, and on March 4, 1898, the contractor was instructed to proceed with the work. (R. 81.)

The Court of Claims, in its findings of fact, found that the work affected by the order of suspension on May 8, 1897, constituted a proportionately small part of the whole contract work, and that at the time of the termination of the suspension the contractor had supplied materials and performed labor aggregating in value about 70 per cent of the whole contract price. The court further found that the evidence does not show how much the completion of the whole contract work was delayed, nor what loss the contractor sustained by reason of said suspension and delay in the work. (R. 81, pars. 7 and 8.)

On April 8, 1898, the contractor was informed that certain changes in the plans of the building were under consideration, and was directed to suspend until further notice such part of the work as might be affected thereby. Subsequently, revised drawings showing the contemplated changes were forwarded to the contractor with a request that a proposal for the extra work involved be furnished. The proposed changes were subsequently abandoned, however, and on May 20, 1898, the contractor was directed to proceed with the work in accordance with the original plans. The Court of Claims found that the evidence does not satisfactorily show either the

amount of the delay in the completion of the contract, or what loss, if any, the contractor sustained by reason thereof. (R. 82, Find. VI.)

The court also found that in addition to the suspensions and delays hereinbefore referred to, there were numerous delays in different items of the work, some of which were chargeable to the contractor and some to the United States, but that the evidence submitted does not satisfactorily show how much loss was sustained by the contractor from such delays. (R. 83, Find. IX.)

On final settlement of the contract the United States did not charge the contractor with responsibility for any part of the delay or delays, and did not charge any liquidated damages on account of the delay in the completion of the contract. The time for the completion of the contract was extended a day for each day of delay caused by the United States. (R. 83, Find. X.)

After completion of the contract it was found that some of the work was defective and had not been performed in accordance with the specifications, which defects were subsequently remedied by the contractor. In some instances the material furnished and work done in substantial compliance with the specifications had to be changed or done over at a considerable additional cost to the contractor. Claim for this additional loss was included in claimants' petition, and the Court of Claims found there was due claimants for such extra labor and material the sum

of $4,397.24. (R. 84–85, Find. XI, XII, XIII, and XV.)

The Court of Claims, accordingly, entered judgment in favor of claimants for $4,397.24, and dismissed the petition as to the balance claimed. (R. 87.) From this judgment claimants appeal to this court.

ARGUMENT.

Appellants ask that the judgment of the Court of Claims be set aside and the case remanded with directions to enter judgment in favor of claimants for the several amounts mentioned in findings, XVII, XVIII, XIX, and XX. (R. 86–87.)

The findings above mentioned read as follows:

XVII.

1. The value of the services of the plaintiff Charles F. Wood, on the contract work during the time of the delay chargeable to the defendants in the completion of the work was $4,000; and the value of the services of their foremen, Healey and McClintock, on the work during such delay was $2,330.

XVIII.

1. The plaintiffs rented and maintained a yard and shop in Washington with necessary equipment for use in their work in Washington. The rental of the yard and shop fairly chargeable to the plaintiffs' work on the post-office building during the period of delay caused by defendants in the completion of the contract was $400; and the reasonable value of the use of the equipment on this work during such period of delay was $800.

XIX.

1. The plaintiffs' overhead expenses chargeable to delay caused by defendants in the completion of the work, not including the items of cost shown by Findings XVII and XVIII above, was $5,975.02.

XX.

1. The plaintiffs expended, for carrying on the work, the sum of $2,088.65, as interest on money borrowed by them after the expiration of the contract period, which expenditure would not have been necessary but for the delay in the completion of the work caused by the defendants.

All of the several amounts now claimed by appellants, as set forth in the above findings, are for damages sustained by appellants through delays caused by the United States in the completion of the contract work.

The contract involved in this action provided that for any delay caused by the United States, the contractor should be allowed a corresponding extension of time in which to complete the work, but that no claim for damages shall be made by the contractor on account of such delay.

The contract provided "that the entire work shall be completed within two hundred fifty (250) working days from the date of the approval of the bond," and that:

> The said party of the second part shall forfeit to the said party of the first part one hundred (100) dollars per diem, as liquidated

> damages, for each and every day thereafter until the completion of the same; provided, that if through any fault of the party of the first part, the party of the second part is delayed in the execution of the work included in this contract, the party of the second part shall be allowed one day additional to the time above stated for each and every day of such delay so caused, the same to be ascertained by the Supervising Architect; provided, *that no claim shall be made or allowed for damages which may arise out of any delay caused by the* party of the first part. (R. 64–5.)

The contract also contained the following provision:

> It is further covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, or additions to, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials, if not agreed upon, to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value, on prevailing market rates; which market rates, in case of dispute, are to be determined by the said Supervising Architect, whose decision with reference thereto shall be binding upon both parties; *and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed.* (R. 65.)

The only question raised by the appeal to this court is whether, in view of the contract provisions above quoted, the United States is answerable in

damages for delays caused by the Government in the final completion of the contract.

This question was decided by this court at the October term, 1920, in *Wells Bros. Co.* v. *United States* (254 U. S. 83), wherein the court had under consideration contract provisions identical with those now presented. In that case, this court used the following language (p. 87):

> Here is a plain and unrestricted covenant on the part of the contractor, comprehensive as words can make it, that it will not make any claim against the Government "for *any damages* which may arise out of *any delay* caused by the United States" in the performance of the contract, and this is emphasized by being immediately coupled with a declaration by the Government that if such a claim should be made it would not be allowed.
>
> Such language, disassociated as it is from provisions relating to "omissions from," and making of, "additions to, or changes in," the work to be done, or "materials" to be used, can not be treated as meaningless and futile and read out of the contract. Given its plain meaning it is fatal to the appellant's claim.

Appellants, in their brief, endeavor to draw a distinction between a *suspension* and a *delay*, contending that while the contract may not allow damages for delays, it does not provide against damages for a suspension of part of the work. This is a distinction without a difference. The evident intent of the contracting parties was to provide for delay in the com-

pletion of the contract work, and the compensation allowed the contractor by the terms of the contract was additional time for the completion of the contract equal to the delay or delays caused by the United States. It is specifically provided by the contract that the contractor shall not make claim for nor be allowed damages for such delay or delays. It is immaterial whether the delay in the final completion of the contract was caused by a mere retarding of the contractor in the execution of the contract, or whether it was caused, as in this case, by a suspension for a time of part of the work. In either event it would result in a delay in the final completion of the entire contract, and the compensation allowed the contractor for such delay, when caused by the Government, is an extension of the contract period equal to such period of delay.

While the entire delay in the completion of the contract was caused by the suspensions complained of, such suspensions related to but a small part of the contract.

The Court of Claims found that approximately 70 per cent in value of the entire contract had been performed at the time of the termination of the suspension of May 8, 1897. At no time during the execution of the contract was the entire work suspended or the entire force of workmen compelled to cease work by reason of any suspension caused by the Government.

It is clearly apparent, therefore, that it is immaterial whether the delay in the final completion of the

contract was due to suspension for a time of part or parts of the work to be performed, or whether the same was due to obstructions to the performance of the contract, for which the Government was responsible.

The contract under consideration by this court in *Wells Bros. Co.* v. *United States, supra*, as quoted in the opinion (pp. 85, 86) contained the following stipulation, namely, "That no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States," and further, that, "No claim for damages, on account of such changes or for anticipated profits, shall be made or allowed."

The above quoted language is practically identical with the provisions of the contract now before this court, and it is submitted therefore that the decision in *Wells Bros. Co.* v. *United States* is decisive in this case.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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